No. 84-95

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
United States of America,
Respondents.

BRIEF OF AMICUS CURIAE CITY OF LOS ANGELES IN SUPPORT OF PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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INTEREST OF AMICUS CURIAE

The City of Los Angeles ("Los Angeles"), a municipal corporation in the State of California, is deeply concerned with regard to the impact the imposition of an interstate access charge will have on Los Angeles ratepayers. Los Angeles has been very active for the last 25 years in California Public Utilities Commission ("CPUC") proceedings appearing on behalf of its citizen ratepayers as well as itself as a municipal corporation. It is in the interest of Los Angeles to ensure that the CPUC sets

reasonable rates which guarantee universal telephone service while concomitantly protecting the financial integrity of the telephone company. We believe that an identical interest is present in the case at bar because the interstate access charge will unreasonably increase costs for the local telephone ratepayers in California and in particular the City of Los Angeles.

Los Angeles supports the position of the National Association of Regulatory Utility Commissioners ("NARUC") in this proceeding. We file this brief to demonstrate our support and to stress several points which Los Angeles feels are critical to its citizen ratepayers.

STATEMENT OF THE CASE

The issue presented in this case evolved from the Federal Communication Commission's ("Commission") "Notice of Inquiry and Proposed Rulemaking" in the matter of MTS and WATS Market Structure, CC Docket No. 78-72 ("Notice of Inquiry"). Since the issuance of the Notice of Inquiry the Commission has issued several supplemental Notices of Inquiry and several Reports and Orders concerning this matter. Of particular concern to Los Angeles is the "Third Report and Order" released on February 28, 1983 and the "Memorandum Opinion and Order" released on August 22, 1983 (hereinafter referred to collectively as the "FCC Orders"); both deal, *inter alia*,with the imposition of interstate access charges on local end-users.

In the above referenced actions the Commission prescribed rules for calculating the charges that end-users will pay a local telephone company after December 31, 1983 for access to the interstate network. The FCC Orders call for the impositon of a flat charge for each residential or party line of $2.00 per month and for each

business line of $6.00 per month. In addition, the FCC Orders call for a transition period during which the residential end-users access charge would gradually increase to $4.00 per month. (Memorandum Opinion and Order, August 22, 1983, para. 33.) The access charge for the business end-users became effective June, 1984. The United States Court of Appeals for the District of Columbia Circuit upheld the FCC Orders with its decision issued June 12, 1984. (*NARUC v. FCC* (D.C. Cir. June 12, 1984) No. 83-1225 Slip Op.)

ARGUMENT

I.

THE INTERSTATE ACCESS CHARGE FOR NON-TRAFFIC SENSITIVE FACILITIES SHOULD BE IMPOSED UPON THE INTEREXCHANGE CARRIER

The purpose of the access charge is to compensate the local telephone companies for the use of their non-traffic sensitive ("NTS") facilities in the interstate market. Los Angeles agrees with this objective but disagrees with the way in which the Commission addressed the matter. The FCC Orders place the entire burden on the local telephone end-user. The unfortunate consequence of the FCC Orders occurs notwithstanding the fact that many end-users will not access the interstate network. The theory ostensibly is that the mere privilege of accessing the interstate market, irrespective of use, requires the imposition of an access charge. (*NARUC v. FCC* (D.C. Cir. June, 1984) No. 83-1225, Slip Opinion at p. 40.) The Court below agreed with the Commission and it denied the numerous petitions requesting the matter to be remanded.

Los Angeles believes that the FCC Orders are unfair and unlawful in several respects. First, many local end-

users will never use the interstate system and many that do will not use it very often. Such end-users are therefore paying for a service without a corresponding benefit. In other words, their property would be taken in violation of the compensation and Due Process Requirements of the Fifth and Fourteenth Amendments. (United States Constitution, Fifth and Fourteenth Amendments.) The beneficiaries of the FCC Orders are the interexchange carriers who will eventually pay nothing towards the costs of non-traffic sensitive plant but will reap huge profits from its use. By imposing such a charge the Commission exceeded its authority and is violating the Federal Communications Act of 1934 insofar as it is setting local intrastate telephone rates (47 U.S.C. 152(b)) rather than interstate rates (47 U.S.C. 201-205).

Los Angeles agrees with the NARUC position that *Smith v. Illinois Bell* (1930) 282 U.S. 133, does not mandate what formula should be utilized to make a fair apportionment, but it does mandate an apportionment. (NARUC Petition at pp. 13-14). The Court below likewise agrees on this point. The Court below erred, however, because it sustained the Commission position which allows the *entire* amount of NTS costs to eventually be placed on the local end-user. (*NARUC v. FCC*, *supra*, Slip Opinion at pp. 37-38.) It accepted the Commission position that the portion of NTS plant used in interstate calling should not be apportioned and thus limited apportionment to the local equipment used entirely for interstate calling (i.e. Common Carrier Line Access Equipment). In other words, where joint use of the same equipment exists no apportionment will be made. As NARUC states:

> "If the D.C. Circuit is correct and the FCC may recover these interstate costs from local exchange ratepayers, as it has attempted to do here, the result

would be the same as if *Smith* had never been decided. Local exchange ratepayers would bear all the costs of the jointly-used local facilities, as they had before 1930. The economic burden *Smith* was purposefully designed to eradicate would remain in full force." (NARUC Petition at p. 13.)

* * *

"The error in the D.C. Circuit's position is that it fails to accept the converse as true. If it is impermissible to allow the States to call for recovery of all local exchange plant costs from intrastate ratepayers it must also be improper to allow the FCC to do what amounts to the same thing by transferring all costs allocated to the interstate jurisdiction back to the intrastate jurisdiction for recovery through flat-rate end user access charges." (NARUC Petition at p. 14.)

The only fair way an apportionment can be made is to assess the interexchange carrier for that portion of the non-traffic sensitive plant that it uses. One method by which to achieve that result is to assign a cost, based upon minutes of use by interexchange customers, to the interexchange carrier. The interexchange carrier would then pass those costs on to its customers. Under this concept the user of the interstate system (i.e. the cost-causer) would be the party paying for the interstate portion of the non-traffic sensitive facilities. This is similar to the relative use concept adopted by the Commission in its April 16, 1980, "Second Supplemental Notice of Inquiry and Proposed Rulemaking." (In the matter of MTS and WATS Market Structure, CC Docket No. 78-72.) The Commission subsequently reversed that ruling with the adoption of the FCC Orders. Los Angeles respectfully

submits that the FCC Orders are an abuse of discretion and should be overturned.

Second, the purpose of the Communications Act of 1934 is to provide as near as possible "to all the people of the United States a rapid, efficient, Nationwide . . . wire and radio communications service . . . at reasonable prices" (47 U.S.C. 151(b)). With the above promulgation, Congress mandated universal telephone service at reasonable prices. The FCC Orders impose an access charge for non-traffic sensitive plant solely on the local end-user and thereby frustrate the purpose of the Act. The interstate access charge as contemplated will cause many subscribers to give up their telephones and "drop off the network", thus threatening the universal telephone service concept.

Although the Commission acknowledges that many subscribers may drop off the network it has not conducted any study to measure the adverse impact of its access charge order. Nationwide, the result could be in the millions and would threaten the health, welfare and safety of the public.[1] Such persons without telephone service would be unable to call the police, fire and medical authorities for help. If the Commission knew the actual number of subscribers that would drop off the system, it might change its mind with regard to the reasonableness of its orders.

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[1]In Application 83-06-65 a California Public Utilities Commission proceeding considering the imposition of an intrastate access charge, Pacific Telephone presented a study with findings that approximately 3% of its subscribers would drop off the network if California adopted a plan identical to that which the FCC has ordered. This estimate, which is conservative at best, means that approximately 240,000 subscribers in the State of California would drop off the network. Obviously, the number will be greater nationwide.

An important point not considered by the Commission is the consequences to the local end-user if the local telephone bill is paid but the interstate portion is not. For example, a situation may arise where a local end-user cannot afford to pay the entire bill and elects to pay only the local bill. Thus preserving the ability to call the police, fire and medical authorities for help. Will the local telephone company (at the order of the interstate company) terminate this customer's entire service or can the interstate service be blocked leaving the local access intact?

Such a situation exacerbates the FCC's intrusion into intrastate ratemaking. The Commission should provide a mechanism for terminating only the interstate service if a ratepayer fails to pay a long distance telephone bill. Under the current FCC Orders a local ratepayer will be denied the ability to make local calls if the ratepayer does not pay the interstate carrier for interstate service. Moreover, any arrangement whereby access to local telephone service is contingent upon payment for interstate service, violates the "Modified Final Judgment" which contemplates local operating companies which are independent from interstate carriers. (*United States v. AT & T* (D.D.C. 1982) 552 F. Supp. 131.) The Commission has not considered the proper methodology for the billing and termination of interstate services. Therefore, the FCC Orders should be vacated for that reason as well as others proffered by the petitioners in this proceeding.

II.

THE ACCESS CHARGE FOR CENTREX-CO USER SERVICE SHOULD BE RECONSIDERED

The Commission, with the FCC Orders, clarified its position with regard to the access charge to be imposed on the Centrex-Co user. Without analysis or reference to evidence in the record, it states that each Centrex line should be treated as any other line between a customer's

premises and the local switch that may be used for local exchange service and a variety of interexchange services. (In the matter of MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, August 22, 1983, at Docket 78-72, para. 42.) However, a Centrex line is not like any other line and the Commission, as well as most other state commissions, has historically not treated Centrex the same as other lines for a variety of purposes (e.g., pricing). Indeed, the Commission's discussion in its Memorandum Opinion and Order (*supra*, at paragraphs 43-49) clearly points out the difference.

The Court below adopted in full the Commission's argument regarding the treatment of Centrex Co-User service. Both the Court and the Commission made reference to a record that allegedly supports its conclusions:

> "However, on the record before us we conclude that these arguments are without merit". (*NARUC v. FCC, supra*, at 58.)

The Court went on to state:

> "The Commission made other findings supported by record evidence which rationally buttressed its conclusion that there is no 'threat to universal service so substantial and so imminent that we must depart from this approach. . . .' Id. at 47, 49 Fed. Reg. at 7816." (*NARUC v. FCC, supra*, at p. 59.)

Yet, neither the Commission nor the Court make specific references to the portion of the record relied upon. Los Angeles submits that the record cannot support the conclusions by the Commission or the Court and that is why neither the FCC Orders nor the Court's Opinion contain specific references thereto. Accordingly, the order of the Court below should be reversed and the entire

matter remanded to the Commission for further hearings and the taking of evidence. To do otherwise will result in a hastily conceived and ill-considered conclusion which unjustifiably harms the ratepayers of this country.

CONCLUSION

On the basis of the foregoing, the City of Los Angeles respectfully submits that the FCC has abused its discretion and exceeded its authority with the adoption of the FCC Orders. The Opinion of the Court below is not supported by the record and should be reversed. The entire matter should be remanded for further consideration.

Dated:

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